No. 84-785

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In The

Supreme Court of the United States

October Term, 1984

JOSEPH FERLITO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTIONS PRESENTED

1. Whether petitioner received a fair trial in view of the fact the the trial court refused to accommodate a serious physical problem which afflicted his lawyer, thereby depriving him of effective assistance of counsel? (United States Constitution, Fifth, Sixth, and Fourteenth Amendments)

2. Whether the court's ruling, which, in essence, precluded petitioner from calling a co-defendant who was severed from his trial (Perrotta), denied petitioner a fair trial and compulsory process for the attendance of witnesses? (Fifth, Sixth, and Fourteenth Amendments)

3. Whether the refusal of the trial judge to grant a brief, but essential, continuance, prior to the commencement of trial, in order to obtain the testimony of the witness, Perrotta, who was unavailable in the absence of such continuance, violated petitioner's rights to a fair trial and to compulsory process to secure the attendance of witnesses? (Fifth, Sixth, and Fourteenth Amendments)

4. Whether the trial court violated petitioner's rights to a fair trial and to confrontation, by ordering the commencement of trial, despite the fact that the bulk of pretrial minutes concerning witnesses who had testified at pretrial and who would testify at the trial, were unavailable? (Fifth, Sixth, and Fourteenth Amendments)

5. Whether the trial court erred in refusing to grant a mistrial when the prosecutor injected an accusation against petitioner of, in essence, suborning perjury, which charge was never formalized into any indictment? (Fifth and Fourteenth Amendments)

6. Whether certain items seized from the interior of petitioner's motor vehicle, especially a gas cap, violated petitioner's

rights to a fair trial and his rights against unlawful search and seizure? (Fourth, Fifth, and Fourteenth Amendments)

7. Whether petitioner's rights to a fair trial were violated as a result of prosecutorial misconduct? (Fifth and Fourteenth Amendments)

PARTIES

The parties in the Supreme Court of the State of New York, Appellate Division, Second Department, were the petitioner and The People of the State of New York.

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Reasons for Granting the Writ:

I. Petitioner, who was indicted together with Ralph Perrotta, for the crime charged in the indictment,

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participated jointly in a protracted series of hearings during a pretrial proceedings. At the conclusion of those hearings, however, Perrotta was severed, over objection of petitioner. The court refused to grant a continuance so that Perrotta could be used as a witness, or at least participate in the trial. Due to oral surgery, as a result of the court's refusal to grant a continuance, Perrotta became unavailable as a witness since he could not even speak during his surgical recuperation and, in addition, could not aid in the joint defense which had been evolved during the hearings. Since Perrotta was an eye-witness, this was a denial of the due process of law. 20

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No.

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OPINION BELOW

The decision of the Supreme Court of the State of New York, Appellate Division, Second Department, is annexed as part of the appendix herein. Application for leave to appeal to the Court of Appeals of the State of New York was denied on September 7, 1984.

JURISDICTION

A. The judgment of the County Court of the County of Suffolk, convicting petitioner of arson in the third degree, after trial before Honorable Marquette Floyd and a jury, was rendered the 25th day of March, 1982.

The petitioner was sentenced to an indeterminate term of 2½ to 7½ years imprisonment and he is presently in "custody" on work release. He served a substantial period in jail as well.

The thrust of the prosecution revolved around the fact that a particular commercial establishment was allegedly damaged by fire, and the petitioner was accused thereof.

Petitioner has consistently maintained his innocence.

B. Petitioner applied for leave to appeal to the Court of Appeals of the State of New York, but, on the 7th day of September, 1984, leave to appeal was denied, per Honorable Richard D. Simons, Associate Judge. The certificate denying leave to appeal is annexed hereto as part of the appendix.

The order of the Appellate Division, Second Department, affirming the judgment of conviction, is likewise annexed as part of the appendix.

C. Jurisdiction to review the judgment and order in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution are involved herein.

STATEMENT OF THE CASE

The prosecution was predicated upon the occurrence of a fire at a business establishment, in which the petitioner had an interest, in Suffolk County. Originally, Ralph Perrotta was named as a co-defendant with the petitioner in the indictment.

Perrotta and petitioner both proceeded to conduct almost four weeks of pretrial hearings, as joint defendants.

When the trial was about to commence, however, Perrotta suffered certain physical medical problems affecting his mouth and teeth, which clearly indicated that it would be impossible for him to proceed to trial at the time designated by the judge who presided at the trial.

The attorney representing petitioner, George Rockman, Esq., had some serious physical problems which made it extremely arduous and difficult for him to proceed with the trial, especially if it were held at any distance from Hauppauge.

Notwithstanding these medical problems with which counsel for petitioner was afflicted, the court refused to grant a continuance and declined to hold a trial closer to counsel's office. This, we maintain, deprived petitioner of the effective assistance of counsel.

A pretrial hearing was held involving both Joseph Ferlito, the petitioner herein, and his co-defendant, Ralph Perrotta.

In these hearings questions of search and seizure and allegedly incriminating statements were probed. Testimony was adduced from twelve witnesses for the prosecution and fourteen defense witnesses, over a nineteen-day period, during which time eighteen prosecution exhibits and ten defense exhibits, as well as four court exhibits, were admitted into evidence.

There was an incomplete transcription of the minutes of these hearings at the time the court ordered the trial to proceed and, of course, this resulted in serious prejudice to petitioner because a number of the witnesses who testified at these pretrial hearings were due to testify at the trial.

Under *People v. Rosario,* 9 N.Y. 2d 286, 213 N.Y.S. 2d 448, which is similar to 18 U.S.C. §3500 (the *Jencks* case), petitioner was entitled to these minutes in order to confront the witnesses with their prior testimony.[1]

The petitioner himself testified at this hearing. He explained that in 1973 he had been president of a firm known as "Italmer Plastic Products, Inc.". In 1977, his brother, Angelo Ferlito, received 49% to 50% of Italmer. A patent infringement suit was filed on behalf of Italmer in the United States District Court for the Eastern District of New York for a patent infringment, and at the time of the hearings that suit was still pending, but only on the question of damages, the issue otherwise having been resolved in favor of Italmer.

According to the petitioner's testimony, Italmer was involved in the business of selling plastic bags imported from Italy (H4-11).[2]

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1. A substantially complete brief was submitted to the court below, consisting of approximately 69 pages, and we incorporate by reference that brief, and this Court, of course, has jurisdiction to review all of the records and briefs used in the court below, which we urge it to do if it is so disposed. The reason for this request is that the record is thousands of pages long and, consequently, the page restrictions in this Court would prevent duplication of the extensive briefs used below.

2. Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated. Where the number is preceded by the prefix "H", the numbers refer to minutes of the pretrial hearings.

This testimony was deemed relevant because, first of all, it bolstered the petitioner's character, and secondly, Italmer was the corporation of which petitioner was President and owned the black Blazer which was the subject of a search and seizure by the police without a warrant.

The black Blazer was registered in the State of Michigan because of the fact that Angelo Ferlito, the petitioner's brother, went to law school in that state (H13).

Joseph Ferlito testified that nobody was authorized to enter the black Blazer on the 23rd of January, 1981, which was also the night of a conflagration, which became the subject of the arson charge herein.

In addition, Angelo Ferlito testified (H117, etc.) as well as Police Officer Albert Grammatico, Charles Bartels (H61, etc.); Ernest Thompson (10/13/81 H3, etc.), as well as a number of other witnesses.

Since we are required to accept the findings of the court below for the purpose of the facts, we draw this Court's attention to the memorandum decision of Judge Sherman. We disagree with the conclusions, but submit that factually, the following is what he found.

On the 23rd of January, 1981, at about 10:00 P.M., a building located at 1083 Montauk Highway in Copiague, Suffolk County, New York, exploded into flames and was severely damaged. Joseph and Angelo Ferlito owned the building.[3]

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3. The building did not belong to the corporation, but was owned by Angelo and Joseph Ferlito.

At about 10:55 P.M., petitioner appeared at the Brunswick Hospital Emergency Room in Amityville, New York, bleeding from his lacerated scalp and right thumb. He was accompanied by co-defendant Ralph Perrotta, as well as Angelo Ferlito.

Ernest Thompson, a security guard at the hospital, was unaware of the fire and asked Joseph what had happened, to which petitioner replied "A building blew up on me". There was the odor of gasoline, detected by this security guard emanating from Joseph's clothing. A nurse named Nelson also detected this odor. Petitioner allegedly told this nurse "I was working on an oil burner and it blew up on me".

Shortly thereafter, a number of detectives and officers, uniformed and plainclothes, appeared and questioned Angelo and Joseph, but when Perrotta reappeared he was questioned as well and informed the police that it was he and not Angelo, who had been with the petitioner that evening.

The court found that at this point in time neither defendant was a suspect in a criminal investigation, nor did the police have reasonable cause to arrest them. At this time, as well the court held that detectives Keating and Guilfoyl arrived at the hospital, having concluded that a crime (arson) had been committed. At their arrival, they were informed by other officers about the defendants and the statements they had made.

As a result of this information, Perrotta and Joseph Ferlito became suspects. It was obvious, the court felt and held, that defendants Perrotta and Joseph Ferlito would have been precluded from leaving the hospital of their own volition and, consequently, they were technically in custody.

With respect to the seizure of Joseph Ferlito's clothing, Judge Sherman held that probable cause to arrest the defendants, that is Perrotta and Joseph Ferlito, did not occur until the conjunction

of Detective Keating's conclusion that arson had occurred. Moreover, he concluded that Joseph Ferlito and Perrotta committed the act. Detective McNeil's seizure of a portion of Joseph's clothing preceded this conjunction, but the seizure of the remainder of Joseph's clothing, according to Judge Sherman, to wit, his shirt, trousers and shoes, occurred when the defendants were in custody at the police precinct.

Turning to the findings with respect to the Blazer vehicle and its contents, the hearing judge held that all the testimony of both the People's and the petitioner's witnesses is consistent as to the condition of the Blazer vehicle as it was parked in the street abutting the Ferlito home, and the fact that it was driven there from the scene of the explosion and fire.

There were different versions as to the route taken.

Shards of glass and fresh blood were found on the vehicle and a trail of blood leading to Ferlito's residence were observed at the arrival of the first police officers responding. At that point, Angelo and Joseph Ferlito were already on their way to Brunswick Hospital.

Judge Sherman found that the police officers gained access to the residence with the voluntary assistance of Salvatore Bono, a friend of the Ferlitos.[4]

The officers entered the house and observed a trail of blood leading to a telephone and, not finding anyone in the house,

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4. We maintain, however, that Bono had no proprietary interest in the house and had no authorization to permit officers to enter there. [*See Payton v. New York, supra; United States v. Matlock*, 415 U.S. 164; *State v. Carsey*, ____Ore.____, 33 CRL 2278 (Sup. Ct. Ore. 5/24/83).]

returned to the scene of the fire. The fact remains that they did enter the house, and we maintain this was a violation of *Payton v. New York*, 45 N.Y. 2d 300, 313, *rev'd. on other grounds,* 445 U.S. 573, *on remand*, 51 N.Y. 2d 169, and other cases in footnote 5.

The court found that a warrantless search of the black Blazer automobile took place on the evening of January 23rd, 1981. The following day, however, a warrant was obtained and a further search was made. The court found that there was sufficient information supplied to the issuing magistrate to sustain the warrant.

It should be noted, however, that the warrant was predicated upon information obtained as a result of an unlawful invasion of the interior of the Ferlito home and of that vehicle without a warrant. Thus, we maintain there was a tainted nexus for the warrant. In other words, it was the "fruit of a poisonous tree."

With respect to the denial of due process, the court found that the defendants had offered witnesses to support their allegations that highly improper police conduct had effectively denied them due process.

Honorable Joseph Jaspan had granted a pretrial hearing pursuant to the holding in *People v. Isaacson,* 44 N.Y. 2d 511.

One Rosemarie Flagillo,[5] testified that a police officer, handling an unrelated matter for the witness, offered her substantial moneys which he had "pocketed" during the arrest of one David Hanley, to plant pills and marijuana in the home of Ferlito, and thus enable police officers to search that home

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5. A person incorrectly described as Angelo's girlfriend by Judge Sherman. There is no support in the record for Judge Sherman's description.

and "get them" for possession of controlled substances. A tape recording was produced and played at the hearing, but the court found it did not substantiate her testimony.

The court found the tape was of poor quality due to substantial background noise, and that segments which were audible clearly evidenced an attempt by police to use the witness to "purchase" a "nickel" from Angelo. As to the money taken from Hanley, the tape disclosed that the officer had turned over the money to police authorities in a routine fashion. This court, according to Judge Sherman, was convinced that the police officer acted properly and in accordance with good law enforcement requirements.

The litany of Angelo Ferlito's tale of persecution by one police officer over a twelve-year period, during which time he had been stopped 30, 40 or 50 times, although never arrested, apparently did not impress the judge. The court, therefore, found the defendants did not meet the barest evidentiary minimum which would put the burden of proof upon the prosecution to negate the charges that defendants' due process rights were denied them.[6]

The court concluded, with respect to the statements which obtained, that prior to the arrival of Detective Keating and Guilfoyl at the hospital, the defendants were not suspected of having committed a crime and thus there was no requirement that they be informed of their constitutional rights. (*See People v. Yukl*, 25 N.Y. 2d 585, 588.) Thus, no grounds for suppressing the statements made at that point in time were required.

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6. The court, however, apparently did not take into cognizance the testimony of Rosemarie Flagillo or Angelo Ferlito, but seemed to be content with the fact that the tape recording was not that audible. We ask this Court to review this matter *de novo*, as its jurisdiction permits.

With respect to the statements identified by the prosecution as those which they intend to introduce into evidence, two were ordered suppressed. The first was a statement made by Joseph while en route to the First Squad Precinct, to the effect that he was cold and sick, since at this time he was in custody and requested a lawyer. Further, the statements made by Ralph Perrotta to Detective Guilfoyl, in response to the latter's questioning, were also suppressed.

Turning to the seizure of Joseph Ferlito's clothing, the court held that none of the clothing items would be suppressed, because the petitioner had been taken into custody by police. *United States v. Edwards,* 415 U.S. 800.

Any clothing obtained prior to that was suppressed since there was an insufficient basis for the actions taken. The court held that mere suspicion is never enough (*People v. Esposito,* 37 N.Y. 2d 156, 160).

Notwithstanding its determination that suppression would ordinarily be required, the court, under the doctrine of "inevitable discovery", came to the conclusion that the evidence would not in fact be suppressed. This is because of the holding of the court that subsequently a lawful seizure of the remainder of Joseph's clothing would ultimately have inevitably led to the seizure of the rest of it.

With respect to the search of the Blazer automobile, the court held that the police offered no evidence to justify a search of that vehicle. The court, however, found that a search in fact occurred.

It is elementary that at a suppression hearing the burden is on the prosecution to "come forward with some evidence to show probable cause" (*People v. Baldwin,* 25 N.Y. 2d 66, 70-71).

Again, the court held that ordinarily, since the prosecution did not meet this burden (*People v. Brockett,* 64 A.D. 2d 612), the search and its products would ordinarily be suppressed.

Again, turning to the so-called doctrine of "inevitable discovery", the court permitted the introduction of this evidence. The court reasoned that the doctrine of "inevitable discovery" holds that where inevitably, due to "independent sources", the evidence in question will be obtained lawfully, suppression due to an unlawful search and seizure is not required, citing *Gilbert v. California,* 388 U.S. 263, 272, and *People v. Ballot,* 20 N.Y. 2d 600, 606. The court said that there was "a very high degree of probability that the evidence in question would have been obtained independently of the tainted source" (*People v. Knapp,* 52 N.Y. 2d 689, 687).

The court further reasoned that the doctrine of inevitable discovery "does not call for certitude as the literal meaning of the adjective 'inevitable' would suggest. What is required is that there be a high degree of probability that the evidence in question would have been obtained independently of the tainted source. (*People v. Payton,* 45 N.Y. 2d 300, 313, *rev'd. on other grounds,* 445 U.S. 573, *on remand,* 51 N.Y. 2d 169)."

With respect to due process, the court stated that *People v. Isaacson,* 44 N.Y. 2d 511 required a demonstration that certain police conduct might be so egregious as to constitute a violation of defendant's right to due process of law and then require that the defendant should not be convicted of the crime for which he is charged.

The court declared that the proof herein utterly fails to establish a right to dismissal pursuant to *People v. Isaacson.*[7]

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7. We maintain, *infra,* that the court erred in this holding.

Turning to the *Dunaway* hearing, the court indicated that it found no violation of the *Dunaway* rule.

A. The Denial of a Fair Trial by Virtue of the Fact that the Court Refused an Adjournment so that the Pretrial Minutes Could Be Transcribed for Use at the Trial Proper, and also the Trial Court Refused to Accommodate the Serious Physical Problem Which Afflicted Defendant's Lawyer, Thereby, in Essence, Depriving Him of Effective Assistance of Counsel.

In the minutes of January 11, 1982, the court's attention was called to the fact by Mr. George Rockman, the trial lawyer for the petitioner, that he had learned that the trial itself was being moved to Riverhead, although the 19 days of pretrial hearings had been held in Hauppauge. Mr. Rockman informed the court as follows (p. 2):

> ". . . I must request an extensive adjournment of this case. Firstly, I found that the matter was moved to Riverhead rather than Hauppauge. I have a personal physical problem which I have which Mrs. Werner is well aware. I have a disc problem and Friday I spent getting trigger point injections in my back for the pain. My doctor has advised me that the worst possible thing I can do is drive. The pretrial hearings in this matter, nineteen days of them, were held in Hauppauge. I could handle Hauppauge. I figured this case would be a three to four week trial which would necessitate approximately forty hours of extra driving, which is just . . . it's just too much of a strain on myself physically."

At page 3 of the same minutes, Mr. Rockman informed the court further that petitioner's mother "has a heart condition, and

it would be extremely difficult for her also to come to . . . [Riverhead]."

The prosecutrix vehemently opposed the adjournment and the court consequently denied the relief which had been requested in the interests of getting a fair trial for the petitioner.

At page 25 of the minutes, Mr. Rockman obviously was referring to the fact that he was wearing a steel or other type of brace, so it is manifest that he was in extreme discomfort and was certainly distracted, to say the very least.

A letter from a Dr. Valente was read into evidence by Mr. Rockman, as follows, on page 30 of the same minutes:

> "Re: George Rockman, Esq. It's addressed to, 'Dear Honorable Judge Floyd, this is to certify that the abovenamed attorney is currently under my care and is actively suffering with a lumbar disc syndrome. He is receiving special disc decompression, manipulation, and trigger point injections by an orthopedist. At this time, it is not in the patient's health and interests to sit and travel for long periods of time. Any consideration for his health problem would be appreciated. Sincerely, Anthony Valente, — Anthony D. Valente, D.C.' "

Mr. Rockman indicated that he had had the problem since an automobile accident in 1977.

An additional reason for the requested adjournment was that the minutes of the pretrial hearing which lasted about 19 days and included the testimony of a number of essential witnesses in the case, were not ready. Mr. Rockman, at page 3 of the same minutes, told the court that the minutes had been ordered, but

that according to Mr. Lardner, the minutes were not going to be available in time for the trial. Mr. Rockman pointed out to the court that "It's absolutely critical that I have the minutes, to review the minutes for the purpose of cross-examination, I would venture to say at least 3,000 pages."

Mr. Rockman continued, "Under the circumstances, *I am not ready to proceed.*"

Mrs. Werner, he informed the court, had called his office on Monday, and he in turn returned her call and advised her that he would be making this application, that he was not ready to proceed. A doctor's note was presented to the court and, in addition, the matter of the minutes was fully set forth.

Furthermore, it was made known to the court that Mr. Lardner had advised counsel that the transcripts would not be ready for approximately three weeks, and that he would need approximately two weeks to review them.

Mr. Lardner, who represented co-defendant Perrotta, informed the court that the minutes had not been prepared, but asked for an adjournment for that reason, as well as an additional reason, which will be set forth, *infra.*

We maintain that compelling the petitioner to go to trial under these circumstances was a clear denial of effective assistance of counsel and also a denial of due process because of the fact that he was entitled to have the minutes for the purpose of confronting witnesses on cross-examination.

In view of *People v. Rosario,* 9 N.Y. 2d 286, 213 N.Y.S. 2d 448, it is difficult to understand how it is possible that the court declined to adjourn the case until the pretrial minutes were made available.

B. The Richards Bombshell

The court held a hearing, out of the presence of the jury, to determine the admissibility of the testimony of one Alan Richards, an alleged police informant, who decided to testify for the petitioner. *This testimony revealed extensive police and prosecutorial misconduct* (1508-1694).

It is significant that the court held that the testimony of Alan Richards could come in to show the bias and hostility of police witnesses, but this was limited only to such witnesses as had actually testified.

Significantly, the court did not permit any inquiry into prosecutorial misconduct since this would have forced the assistant district attorney in charge of the case to testify, which would constitute reversible error. Since the petitioner had Richards' testimony since December, the court stated that he could have notified the court that it was necessary to change prosecutors under the circumstances. (But motions for recusal of Mrs. Werner had been made during jury selection and thereafter.)

According to Richards, when he first spoke to Detective Keating, he denied all knowledge of the fire, but Detective Keating said he would like to "get" the petitioner. Richards was threatened that otherwise he himself might be implicated in the cause of the fire (1705). The police told the witness that if he did not consent to be wired for sound, that he himself would be blamed for the fire. They supplied Richards with information with which he could try to convict the petitioner (1705-1709).

Richards stated that after repeating his refusal to be wired, he went to the Arson Squad. He encountered Detectives Resch, Guilfoyl and Keating, as well as the prosecutrix in this case.

At this meeting Detective Keating told Richards to call the petitioner at his home while a "bug" was placed on the phone. In addition, Richards was instructed to set up a meeting with the petitioner and to tell Ferlito that he himself had been arrested for the arson (which was not the truth) and that he used to hang out in the back of the Miramar building.

Richards stated he was offered $2,500 for this information and cooperation, as well as any action leading to the conviction of the petitioner on the arson charge (1709-1715).

Richards declared that he was threatened by the authorities that if he did not cooperate, in essence he would be arrested, and, secondly, word would be spread out in the "street" that he was a police informer, which he had been since age 13. Richards stated that he was in such fear that he was frightened for his own life (1717).

Because of this fear, he played along with the detectives, and in the telephone conversation he asked the Ferlitos what he should do, and they told him just "Tell the truth" (1718-1722).

In addition, Richards said the police asked him to mention attorney George Rockman's name in order to get Rockman involved in a frameup for subornation of perjury (1723-1725). He actually met the Ferlitos and had conversations with them. Richards told the detectives, before signing a "prepared" statement implicating the petitioner, that "It wasn't right" and "There were things in there that just didn't happen".

In response to these protestations, Detective Keating said it wouldn't be a good conviction without it, that Richards should just sign it, and, at that point Richards stated he signed the statement inculpating the petitioner.

In fact, Richards insisted that he had signed false statements for the Suffolk County Police Department in the past, on at least two or three occasions. Richards stated he would have signed any kind of statement because of the fear that they had instilled into him.

Richards, subsequently, gave petitioner's counsel, George Rockman, Esq., a notarized statement on December 31, 1981, embodying his allegations against the authorities.

Furthermore, Richards declared that he lived near the Miramar building and knew that it was a "hangout" for kids where they would loiter behind the building, get drunk, and smoke pot. This would occur day and night (1736-1739).

Richards further testified that he signed a statement, at the insistence of the police, concerning threats allegedly made against him by Angelo and Joseph Ferlito, to the effect that the could be arrested for burglary third degree and other crimes. He stated, however, that this statement was false and that he signed it at the insistence of Detective Guilfoyl (1740-1741). In return for this false statement the witness was promised $2,500 from the Arson Squad Recovery Program (1743-1744; 1747).[8]

THE DEFENSE

Paulette McColme testified for the defense that she had been waiting in the hospital emergency room the night of the fire, arriving about 11:00 or 11:30 P.M. When she arrived in the emergency room, she observed a commotion occurring and heard a man, whom she later found out to be Joseph Ferlito, yelling for his lawyer and shouting out his phone number and being told

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8. The "Isaacson Hearing Minutes" should be considered as mutually supportive by the Richards testimony.

"Shut up" by the police officers. McColme said this happened a couple of times. She observed about ten police officers in the area of the emergency room (1829-1831). She further observed police officers pushing Angelo Ferlito and Joseph Ferlito. So far as she could observe, no police officer ever called a lawyer for the petitioner (1835). This witness did not even know the petitioner prior to this incident.

Daniel Doyle, a next-door neighbor of the Ferlitos, stated that he observed the petitioner's Blazer on the 23rd of January, 1981, from a distance of about 100 feet. The entire area was light and brightly illuminated. He noticed police officers inside the Blazer truck.

He also confirmed the fact that kids frequently were to be seen behind the Miramar building (1870-1871).

On cross-examination, the prosecutor asked questions concerning the co-defendant, Ralph Perrotta, and a mistrial motion was made, which the court denied (1876-1879).

Another witness, Joseph Bosch, a friend of the petitioner, testified that he saw the petitioner working on the boiler in the Miramar building on two separate occasions prior to January 23, 1981. The latest time was the afternoon of the 23rd. While he changed his shirt and pants, he did not change his shoes after cleaning the boiler. (It will be remembered that hydrocarbons were found only on his shoes.) He stated that he was with Perrotta that evening and stopped at a delicatessen. He was driving his truck and observed the Miramar building, which he approached, but then went back toward his truck, at which time the building exploded. He had seen two or three kids in the parking lot, and one already climbing the fence (1963-1973).

He categorically denied that he had anything to do with the fire or the explosion.

Petitioner stated that he sustained injuries which included a cut on the rear of his head about one and one-half inches long, and a cut on the right thumb, as well as on a spot over the left eye. He also had a small cut on his left hand (1980-1981).

He stated that at about four months prior to the fire he had called the police at least three times and informed them about graffiti, a break-in, and another graffiti incident in the Miramar building (2038). He further declared that he had not actually read the contract for the sale of the Miramar building since his brother was a law student and he relied upon his brother (2155-2159).

Furthermore, he stated that he used gasoline and kerosene on many occasions, including the afternoon of the 23rd of January, when he used kerosene (2162). This was in connection with the cleaning of his own boiler at home.

On cross-examination, the prosecutrix asked the petitioner whether it was a fact that at the beginning of October Mr. Richards had sworn out statements to the police incriminating Joseph Ferlito in the *crime of criminal solicitation*.

A mistrial motion was immediately made, because this referred to an *uncharged crime* of which the petitioner was certainly presumed innocent and, in fact, which the court had told counsel to stay away from (H381-3). It must be borne in mind that there were only statements from Richards, and no formal charges ever lodged. The court admonished the jury, but denied the motion for a mistrial (2191-2204).

Joseph Ferlito denied that he was splashed with gasoline around the Miramar building. He insisted upon his innocence (2225-2226).

REASONS FOR GRANTING THE WRIT

I.

Petitioner, who was indicted together with Ralph Perrotta, for the crime charged in the indictment, participated jointly in a protracted series of hearings during a pretrial proceedings. At the conclusion of those hearings, however, Perrotta was severed, over objection of petitioner. The court refused to grant a continuance so that Perrotta could be used as a witness, or at least participate in the trial. Due to oral surgery, as a result of the court's refusal to grant a continuance, Perrotta became unavailable as a witness since he could not even speak during his surgical recuperation and, in addition, could not aid in the joint defense which had been evolved during the hearings. Since Perrotta was an eye-witness, this was a denial of the due process of law.

Ralph Perrotta was indicted as a co-defendant herein and participated in the pretrial hearings.

On the eve of trial, however, his lawyer informed the court that it would be necessary for Perrotta to undergo oral surgery and the removal of teeth. A short adjournment of a couple or so weeks was thought to be all that was needed.

The defense of the case centered around the fact that the defendants would both rely upon each other's testimony to some extent, to establish their innocence. They had been in each other's company at the time of the incident.

A severance was opposed, but the prosecutrix insisted on proceeding and the court declined to adjourn the case. As a result, it mandated a severance of Perrotta, and ordered Ferlito to proceed to trial alone.

As it turned out, during the trial, because of the oral surgery, Perrotta was not available to testify. This was most prejudicial to the petitioner because Perrotta would have been able to testify that he was with the petitioner the entire time on the 23rd of January, 1981, and that he had seen "kids" running from the Miramar building just before the explosion. Furthermore, he could testify that neither he, nor the petitioner, ever entered the building or had anything to do with the fire or explosion.

Despite the fact that a subpoena was served on Perrotta, the court failed to enforce the subpoena. This obviously severely prejudiced the petitioner and deprived him of his Sixth Amendment right to compel the attendance of witnesses and to confront witnesses. Obviously, it also deprived him of the due process right to a fair trial. Perrotta was an indispensable witness for the defense!

The petitioner actually succeeded in getting Perrotta to court, but, unfortunately, Perrotta was physically unable to testify because of the surgery (2044-2047).

It has been held that *a continuance of trial does not violate the speedy trial rules where, because of medical unavailability, a witness who is essential to the case cannot testify at the moment.* Such unusual circumstances justify a court in granting a continuance. Such circumstances take the case out of the purview of the speedy trial rules (*i.e.*, CPL 30.30; Fifth Amendment, United States Constitution).

The failure of the trial court to grant a continuance or to enforce the subpoena compelling the testimony of Perrotta denied petitioner compulsory process and confrontation, in violation of the Fifth, Sixth and Fourteenth Amendments (*Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920; and, *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351).

II.

The court's insistence that the trial proceed, even though the bulk of pretrial hearing minutes were unavailable, precluded an effective defense since it disabled petitioner from proper confrontation of the numerous witnesses who had testified at pretrial hearings and who had also testified at trial for the prosecution.

As we have indicated, the trial court directed the proceedings against petitioner to continue without the presence of co-defendant Perrotta, and thus compelled Ferlito to proceed to trial alone. This was bad enough, because Perrotta and petitioner had jointly conducted the pretrial hearings, but, the failure to afford a right to obtain the transcripts of proceedings, in essence, precluded proper confrontation of the witnesses who testified at both the pretrial hearings and at the trial itself. (*See Wade v. Wilson*, 396 U.S. 282, 90 S. Ct. 501; and, *Long v. Iowa,* 385 U.S. 192, 87 S. Ct. 362).

In federal proceedings, 18 U.S.C. §3500 mandates the production of statements of witnesses who have given testimony previously and who testified at the trial on behalf of the prosecution, to be delivered to defense counsel for use as confrontation material.

We maintain that this, in essence, is a due process right, as well as a Sixth Amendment application on the part of the court and the prosecution. (*See Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531).

III.

As we have indicated in the statement of facts, the court refused to suppress evidence seized from the interior of petitioner's vehicle, despite the fact that the court concluded that the search was invalid. It justified the police action in seizing a "gas cap", under the doctrine of inevitable discovery. We maintain that this does not fit the pattern of *Nix v. Williams,* 104 S. Ct. 2501, since the evidence would never have been discovered by lawful means.

After ruling that the search conducted by the police of various premises, including the vehicle owned by the petitioner, the court concluded that the search of the vehicle was not justified.

Although this case was decided before *Nix v. Williams,* 104 S. Ct. 2501, which is the so-called "inevitable discovery" case, it is obvious that the instant litigation does not fit the parameteres of *Nix* since the court already ruled that the search was improper. Thus, the prosecution did not establish that it was "inevitable" that the gas cap and hydrocarbons thereon would have been discovered by lawful means, irrespective of any other issue in the case.

The same is true of the other searches conducted herein.

It is further elementary that a third party, not a resident or owner of the premises involved, cannot consent to entry by the police. (*See United States v. Matlock,* 415 U.S. 164.)

IV.

The failure of the court to grant a continuance and to keep the case closer to defense counsel's office, which would have been no problem since the preliminary hearings were held at such location, deprived petitioner of a fair trial and effective assistance of counsel, because his trial lawyer had serious physical problems which substantially precluded effective assistance of counsel under the circumstances.

The hearings that consumed almost four weeks time, which were conducted pretrial, were located in Hauppauge, New York, which was closer to defense counsel Rockman's office.

Rockman had a severe physical ailment and terrible pain. His doctor forbade him to travel any substantial distances. Nevertheless, the court moved the trial much further out in Suffolk County, to Riverhead, Long Island, and refused to accommodate counsel's dilemma, which we maintain deprived petitioner of effective assistance of counsel. *(See Geders v. United States,* 425 U.S. 80, 47 L. Ed. 2d 592; *Holloway v. Arkansas,* 435 U.S. 475, 55 L. Ed. 2d 426; *Adams v. United States ex rel. McCann,* 317 U.S. 269, 87 L. Ed. 268. *See also, Hudspeth v. McDonald* 120 F. 2d 962 (10th Cir.), *cert. den.* 314 U.S. 617, *reh. den.*, 325 U.S. 892; 17 U. Chi. L. Rev. 718; and *Pelley v. United States*, 214 F. 2d 597 (7th Cir.), *cert. den.* 348 U.S. 915).

Effective counsel contemplates counsel who *in fact* is functioning effectively; not one who is distracted by pain and discomfort. A continuance should have been granted, or new counsel brought in who was sufficiently prepared to proceed.

> "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'.

It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer--to the untrained layman may appear intricate, complex and mysterious." *See Johnson v. Zerbst*, (304 U.S. 458, 146 A.L.R. 357).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

CERTIFICATE DENYING LEAVE TO APPEAL TO COURT OF APPEALS, STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. RICHARD D. SIMONS, *Associate Judge*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOSEPH FERLITO

Appellant.

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
September 7, 1984

s/ Richard Simons
Associate Judge

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* Description of Order:

Certificate Denying Leave

Appeal from an order of the Appellate Division, Second Department, dated May 7, 1984 which affirmed a judgment of County Court, Suffolk County, rendered March 25, 1982.

ORDER OF AFFIRMANCE OF APPELLATE DIVISION, SECOND DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 7, 1984.

HON. LAWRENCE J. BRACKEN, Justice Presiding,
HON. JAMES F. NIEHOFF,
HON. ISAAC RUBIN,
HON. CHARLES B. LAWRENCE.
Associate Justices

The People of the State of New York,

Respondent,

v.

Joseph Ferlito,

Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Joseph Ferlito, defendant in this action, having appealed to this court from a judgment of the County Court, Suffolk County, rendered March 25, 1982; and the said appeal having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Daniel J. Murphy, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

Order

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Order

2338S
P/jc

LAWRENCE J. BRACKEN, J.P.
JAMES F. NIEHOFF
ISAAC RUBIN
CHARLES B. LAWRENCE, JJ.

_____AD2d_____ A - April 5, 1984

1045 E The People, etc., respondent, v Joseph Ferlito, appellant. (Ind. No. 441/81)

Irving Anolik, New York, N.Y., for appellant.

Patrick Henry, District Attorney, Riverhead, N.Y. (Daniel J. Murphy of counsel), for respondent.

Judgment of the County Court, Suffolk County (FLOYD, J.), rendered March 25, 1982, affirmed. No opinion.

BRACKEN, J.P., NIEHOFF, RUBIN and LAWRENCE, JJ., concur.

May 5, 1984 PEOPLE v FERLITO, JOSEPH 1045 E